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CITATIONS

715-522—63——1

Statutes—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ———

UNITED STATES OF AMERICA, PETITIONER

v.

ROY LEE BARRETT, JACKIE HAMILTON GAINEY, AND CLEVELAND JOHNS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review those portions of the judgment of the United States Court of Appeals for the Fifth Circuit which reversed respondents' convictions of possessing an unregistered still (count 1) and carrying on the business of a distiller without having given bond (count 2).[1]

OPINION BELOW

The opinion of the court of appeals (App., *infra*, pp. 15–32) is not yet reported.

[1] We do not seek review of the reversal of respondents' convictions of carrying on the business of a distiller with intent to defraud the United States of taxes (count 3).

JURISDICTION

The judgment of the court of appeals was entered on September 5, 1963. On October 4, 1963, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 4, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the statutory presumptions established by Section 5601(b) of the Internal Revenue Code, as here applied, are invalid under the due process clause of the Fifth Amendment.

STATUTE INVOLVED

Section 5601 of the Internal Revenue Code of 1954, as added by 72 Stat. 1398–1399, 26 U.S.C. 5601, provides in pertinent part:

> (a) OFFENSES.
>
> Any person who—
>
> (1) UNREGISTERED STILLS.
>
> Has in his possession or custody or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or
>
> * * * * *
>
> (4) FAILURE OR REFUSAL OF DISTILLER OR RECTIFIER TO GIVE BOND.
>
> Carries on the business of a distiller or rectifier without having given bond as required by law; * * *
>
> * * * * *
>
> shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.

(b) PRESUMPTIONS.

(1) UNREGISTERED STILLS.

Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

(2) FAILURE OR REFUSAL OF DISTILLER OR RECTIFIER TO GIVE BOND.

Whenever on trial for violation of subsection (a)(4) the defendant is shown to have been at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, respondents were convicted on three counts of a four-count indictment (R. 2–3) [2] charging illegal distilling opera-

[2] The court directed an acquittal on count 4, which charged that the respondents worked in a distillery in which no sign was placed and kept showing the name of the person engaged in the distilling and denoting the business (R. 49, 56–57, 66).

tions in violation of the Internal Revenue Code (R. 66–70). Count one charged them with possession, custody and control of an unregistered still (26 U.S.C. 5601(a)(1)); count two, with carrying on the business of a distiller without having given the bond required by law (26 U.S.C. 5601(a)(4)); and count three, with carrying on the business of a distiller with intent to defraud the United States of the taxes imposed on liquor (26 U.S.C. 5602). Respondents were sentenced generally on the three counts, Barrett to imprisonment for one year and one day, Gainey to imprisonment for 15 months, and Johns to imprisonment for two and one-half years (R. 66–70).

The court of appeals reversed the convictions on all three counts and remanded for a new trial on counts one and two (App., *infra*, p. 33).

The evidence for the government showed that at about 4:40 a.m. on the morning of March 25, 1960, while federal and State revenue agents were maintaining surveillance of an unregistered still in Dooly County, Georgia, respondents drove up to the site. They were in a truck which was being driven with the headlights off. When the truck stopped, respondent Gainey got out carrying a flashlight. He started to run when he saw the officers and was arrested after a short chase. The other respondents rolled up the windows of the truck, locked the door and tried to back out of the area. They were arrested before they could escape (R. 5–6, 22–23, 37–39).

In the truck the officers found a full cylinder of butane gas, which was identical to eight other cylin-

ders found at the site of the still (R. 6, 18, 26–27). The still was being fired with butane gas and consisted of two 2,250 gallon metal tanks capable of producing between 450 and 500 gallons of whiskey (R. 6–7). The officers testified that, shortly after his arrest, respondent Barrett admitted that the still belonged "to all of them" and that they "had set it up" a few days before (R. 8–9, 16, 41–42). The owner of the property on which the still was located testified that respondent Johns had offered him "$15 a week" to use his land to "do a little business" (R. 27–30).

In commenting on the evidence and the consideration the jury should give the "presumptions" provided by 26 U.S.C. 5601(b) (1) and (2), *supra*, p. 3, the trial judge gave the following instructions (R. 61–63):

> There is one other matter which I should mention. I charge you that the presence of defendants at a still, if proved, with or without flight therefrom, or attempted flight therefrom, if proved, would be a circumstance for you to consider along with all the other testimony in the case. Of course, the bare presence at a distillery and flight therefrom of an innocent man is not in and of itself enough to make him guilty. It is possible under the law for an innocent man to be present at a distillery, and it is possible for him to run when about to be apprehended, and such an innocent man ought never to be convicted, but presence at a distillery, if you think these men were present, is a circumstance to be con-

sidered along with all the other circumstances [*sic*] in the case in determining whether they were connected with the distillery or not. Did they have any equipment with them that was necessary at the distillery? What was the hour of day that they were there? Did the officers see them do anything? Did they make any statements?

It is your duty to explore this case, analyze the evidence pro and con fairly. Presence at a still, together with other circumstances in the case, if they are sufficient in your opinion to exclude every reasonable conclusion except that they were there connected with the distillery, in an illegal manner, having possession and custody and control of it and carrying on the business as charged in these two counts, if you believe those things, would authorize you in finding the defendants guilty.

And under a statute enacted by Congress a few years back when a person is on trial for possession of a nonregistered distillery, as in this case, or for carrying on the business of a distiller without giving bond as required by law, as charged in this case, and the defendant is shown to have been at the site of the place at the time when the distilling apparatus is set up without having been registered, or where and at the time when the business of a distiller was engaged in or carried on without bond having been given, under the law such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury.

> Now this does not mean that the presence of the defendant at the site and place at the time referred to requires the jury to convict the defendant, if the defendant by the evidence in the case, facts and circumstances proved, fails to explain his presence to the satisfaction of the jury. It simply means that a jury may, if it sees fit, convict upon such evidence, as it shall be deemed in law sufficient to authorize a conviction, but does not require such a result.

The court of appeals held that the statutory presumptions, as embodied in the instructions of the trial judge, are invalid. The court first stated that the presumption "gives short shrift" to the defendant's constitutional privilege not to take the witness stand, and that its effect is to shift to the defendant the burden of coming forward with an exculpatory explanation, thereby depriving him of the presumption of innocence (App., *infra,* pp. 20–21). Although it concluded that "[t]hese considerations compel the courts to scrutinize closely any statutory rebuttable presumption," (App., *infra,* p. 22), the court appears to have placed its decision on another ground: that Section 5601(b) violates the due process clause of the Fifth Amendment because the fact on which the statutory presumption is based (presence at a still) does not reasonably justify an inference of the ultimate fact presumed (possession of the still, or carrying on the business of a distiller without posting a bond). Such an inference was unwarranted, the court reasoned, because (App., *infra,* p. 28):

> * * * there are many inferences other than possession which can be drawn from presence

> at a still. A defendant might be a hunter who stumbled upon the still * * *. He might even be a prospective purchaser of the liquor. He might be present for any one of dozens of other equally probable reasons having nothing to do with possession. * * *

Reversing the convictions on counts 1 and 2 because of the references to the presumption in the trial court's charge, the court of appeals noted that there was sufficient independent evidence to support a jury verdict of guilty on these two counts and remanded them for a new trial.[3]

REASONS FOR GRANTING THE WRIT

This case involves the constitutionality of the presumptions (or, more accurately, inferences) established by Congress in Section 5601(b) of the Internal Revenue Code. Subsection (1) of that section provides that when a defendant charged with possession, custody or control of an illegal distillery (in violation of Section 5601(a)(1))—

> * * * is shown to have been at the site or place where, and at the time when, a still or distilling apparatus was set up without having been registered, such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury (or of the court when tried without jury).

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[3] As to count 3—which charged respondents with carrying on the business of a distiller with intent to defraud the United States of taxes—the court reversed on the grounds (1) that the trial court's instructions had failed to make clear that the statutory presumptions did not apply to this count and (2) that the evidence did not show any intent to defraud.

Subsection (2) makes similar provision when a defendant is charged with carrying on the business of a distiller without posting a bond (in violation of Section 5601(a)(4)).

These statutory provisions have previously been upheld against constitutional attack by two circuits and applied without question as to constitutionality by a third (see *infra*, p. 10). The Fifth Circuit, however, has struck them down on the ground that due process is violated because of the lack of a "rational connection" between the fact proved (presence at the site of an illegally operated still) and the ultimate fact presumed (possession of the still, or carrying on the business of a distiller without posting bond). The court's conclusion was doubtless influenced by its expressed view that the statutory presumption "gives short shrift" to the constitutional privilege of the defendant not to be a witness against himself (App., *infra*, p. 20). Neither of these constitutional objections, we submit, is well founded. At all events, the question is one which has obvious practical importance from the standpoint of the administration of the revenue laws,[4] and the conflict between the circuits

[4] Section 5601(b) was enacted by Congress in 1958 to obviate difficulties encountered following this Court's decision in *Bozza* v. *United States*, 330 U.S. 160. The Senate Report stated:

"The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act." S. Rep. No. 2090, 85th Cong., 2d Sess., p. 189 (1958).

as to the validity of the act of Congress should be resolved by this Court.

1. In holding that the statutory presumptions here lack the rational basis required by the due process clause, the decision below is squarely in conflict with that of the Sixth Circuit in *United States* v. *Phillips*, 286 F. 2d 428, certiorari denied, 365 U.S. 884. There, precisely the same contention was made by the defendant[5] and necessarily rejected by the court of appeals in a brief *per curiam* opinion (citing cases such as *Yee Hem* v. *United States*, 268 U.S. 178, *Casey* v. *United States*, 276 U.S. 413, and *Caudillo* v. *United States*, 253 F. 2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931, in which presumptions contained in the narcotics laws were upheld against similar challenges). Moreover, the suggestion of the court below that Section 5601(b) operates to shift the burden of proof to the defendant and thereby deprives him of the presumption of innocence is directly contrary to the holding of the Fourth Circuit in *United States* v. *Ivey*, 310 F. 2d 227, certiorari denied, 372 U.S. 929. See, also, *Brown* v. *United States*, 317 F. 2d 521 (C.A. 5), and *Robbins* v. *United States*, 290 F. 2d 281 (C.A. 10), in both of which the Section 5601(b) presumptions were applied without any apparent doubt of their constitutionality.

2. The standard to be applied in determining the constitutionality of a statutory presumption under the due process clause is well established. In the leading case of *Yee Hem, supra*, at 183, this Court, up-

[5] See Petition for Certiorari and Brief in Opposition, No. 712 Misc., 1960 Term.

holding the presumption created by the Narcotic Drugs Import and Export Act of 1909 (now 21 U.S.C. 174) [6]—upon which Section 5601(b) was modeled—reaffirmed the test originally enunciated in *Mobile, J. & K.C. R.R.* v. *Turnipseed,* 219 U.S. 35, 43:

> That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed.

More recently in *Tot* v. *United States,* 319 U.S. 463, 467–468, the Court held that a statutory presumption cannot be sustained if there is "no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." [7] See, also,

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[6] This statute provides:

"Whenever * * * the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." A like presumption exists with regard to illegal importation of marihuana (see 21 U.S.C. 176(a)).

[7] The actual ruling in *Tot* that the presumption created by the Federal Firearms Act, 52 Stat. 1250, 1251, was irrational is, of course, not controlling here. It is one thing, as in *Tot*, to say that there is no rational connection between the fact of

Casey v. *United States*, 276 U.S. 413, 418; *Hawes* v. *Georgia*, 258 U.S. 1, 4; *Luria* v. *United States*, 231 U.S. 9, 25–26.

The presumptions in issue here satisfy the test of rationality established by these decisions. Illicit distilling operations, by their very nature, are carried on clandestinely in secluded places safe from intrusion by those not privy to the enterprise. Taking that into account and drawing upon its experience in human affairs, Congress was justified in concluding that a person apprehended at the site of an illegally operated distillery, without another obvious explanation, would almost invariably be a participant both in the distilling business and in the possession of the still.[8]

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possession of a firearm by a fugitive or a person previously convicted of a crime of violence and the fact of receipt of the firearm in interstate commerce after the enactment of that statute. It is obvious, on the other hand, that presence at the site of an illegal still is an incriminating fact.

[8] As Professor Morgan has observed (*Tot* v. *United States: Constitutional Restrictions on Statutory Presumptions*, 56 Harv. L. Rev. 1324 (1943)), Congress should have considerable latitude in authorizing inferences of this kind. He states (*id.*, p. 1325):

"* * * Whether one fact forms the basis for a rational inference of another depends upon the relationship between them in human experience. The court is composed of a very limited number of judges, most of them having infrequent contacts with the great mass of the people and having limited means of acquiring information as to pertinent current conditions. The legislature is made up of a large body of men drawn from a large area and having ample opportunity to mingle with people and learn what is happening. The segment of human experience with which they are acquainted is much larger than that with which the members of the court are

3. We also disagree with the court of appeals' suggestion that the statutory presumptions may run afoul of the privilege against self-incrimination. In procedural terms, the effect of the statute is twofold: First, it admonishes the trial and appellate judges that proof of the defendant's presence at the site of an illegal distillery is enough, without more, to prevent a directed verdict of acquittal or a judgment setting aside a conviction for lack of sufficient evidence. Secondly, it authorizes an instruction to the jury such as that given by the trial court here—*i.e.*, that, while the jury is not *required* to draw the statutory inference, it is *free* to do so, provided that, all evidence considered, the jury is convinced beyond a reasonable doubt that the defendant is guilty of the crime charged (see *supra*, pp. 5–7).

What was said in *Yee Hem, supra*, 268 U.S. at 185, therefore applies equally here:

> The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession,

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familiar. Consequently the judgment of the legislature is likely to have much the better basis in knowledge of pertinent facts, and the court should be slow to declare that judgment so unfounded as to be incapable of acceptance by reasonable men; but when the question is whether reasonable men may differ as to whether a given inference may reasonably be drawn from given data, the answer of the tribunal of last resort may rationally be accepted."

that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

4. We deal here with the essential validity of the statute. This is not a case in which the district court gave the statute an extreme meaning or applied it to an abnormal set of facts. On the contrary, the presumption was fairly applied here if ever, and the instructions were as favorable to petitioner as the statute would permit.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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NOVEMBER 1963.

APPENDIX

In the United States Court of Appeals
for the Fifth Circuit

No. 19574

ROY LEE BARRETT, JACKIE HAMILTON GAINEY AND CLEVELAND JOHNS, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Middle District of Georgia

September 5, 1963

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and JOHNSON, District Judge

WISDOM, *Circuit Judge:* The defendants-appellants raise an important issue—the constitutionality of the statutory presumptions which Section 5601(b), Title 26 U.S.C.A. establishes. These are presumptions of a defendant's possession of a still and of carrying on the business of a distiller on a showing of the defendant's unexplained presence at the site of an unregistered still. Reluctantly, because of a proper respect for Acts of Congress and because of the special competency of the legislature generally to establish rules of evidence and procedure,[1] we feel

[1] A rule of presumption is simply a rule changing one of the burdens of proof, *i.e.* declaring that the main fact will be in-

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compelled to hold that these presumptions violate the due process clause of the Fifth Amendment.

About a quarter to five on the morning of March 25, 1960, Roy Barrett, Jackie Gainey, and Cleveland Johns, the defendants, drove up in a truck to an unregistered still. Gainey got out and, seeing several officers, started to run. The officers outran him and arrested him. Barrett and Johns rolled up the windows of the cab, locked the doors, and tried to back the truck out of the yard. One of the officers broke a window with his flashlight and arrested the two men. The truck carried a full cylinder of butane gas similar to eight other cylinders found at the site of the still. The still, composed of two 2250-gallon tanks, was capable of producing between 450 and 500 gallons of whiskey. At the trial the officers testified that Barrett, shortly after his arrest, said that the still belonged to all three men. They had gone to the still "to make the first run."

The defendants were convicted on three of four counts of violating the Internal Revenue Code provisions relating to illegal distilling. The first two counts charge the defendants with possessing an unregistered still and with carrying on the business of

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ferred or assumed from some other fact until evidence to the contrary is introduced. There is not the least doubt, on principle, that the Legislature has entire control over such rules, as it has (when not infringing the Judiciary's prerogative) over all other rules of procedure in general and evidence in particular—subject only to the limitations of the rules of Evidence expressly enshrined in the Constitution. If the Legislature can abolish the rules of disqualification of witnesses and grant the rule of discovery from an opponent, it can shift the burden of producing evidence. 4 Wigmore on Evidence § 1356 (3d Ed. 1940).

a distiller without having given the bond required by law. 26 U.S.C.A. 5601(a) (1) and (4). Count Three charges them with carrying on the business of a distiller with intent to defraud the United States of the taxes imposed upon liquor. 26 U.S.C.A. 5602. Count Four charges the defendants with "work[ing] in a distillery for the production of spiritous liquors upon which no sign was placed and kept, showing the name of the person engaged in the distilling and denoting the business." The trial judge directed a verdict of not guilty on this last count. The district court sentenced Barrett to one year and one day, Gainey to fifteen months, and Johns to two and one-half years in the custody of the Attorney General.

Section 5601 provides in part:

> (a) Offenses.—Any person who—
>
> (1) Unregistered stills.—has *in his possession* or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5179(a); or
>
> * * * * *
>
> (4) Failure or refusel of distiller or rectifier to give bond.—*carries on the business of a distiller* or rectifier without having given bond as required by law;
>
> * * * * *
>
> (b) Presumptions.—
>
> (1) Unregistered Stills.—Whenever on trial for violation of subsection (a)(1) the defendant is shown to have been at the site or place where, and at the time when, a still or distilling apparatus, *such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury* (or the court when tried without jury).

(2) Failure or refusal of distiller or rectifier to give bond.—Whenever on trial for violation of subsection (a)(4) the defendant is shown to *have been* at the site or place where, and at the time when, the business of a distiller or rectifier was so engaged in or carried on, *such presence of the defendant shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the jury* (or of the court when tried without jury).

These presumptions were added to the Internal Revenue Code by the Excise Technical Changes Act of 1958, 72 Stat. 1398. According to the report of the Senate Finance Committee recommending the changes, the purpose of these provisions was to overcome the effect of *Bozza* v. *United States,* 1947, 330 U.S. 160 S. Ct. 645, 91 L. Ed. 818:

> Their purpose is to create a rebuttable presumption of guilt in the case of a person who is found at illicit distilling or rectifying premises, but who, because of the practical impossibility of proving his actual participation in the illegal activities except by inference drawn from his presence when the illegal acts were committed, cannot be convicted under the ruling of the Supreme Court in Bozza v. United States (330 U.S. 160, 67 S. Ct. 645, 91 L. Ed. 818).
>
> The prevention of the illicit production or rectification of alcoholic spirits, and the consequent defrauding of the United States of tax, has long been rendered more difficult by the failure to obtain a conviction of a person discovered at the site of illicit distilling or rectifying premises, but who was not, at the time of such discovery, engaged in doing any specific act.

> In the Bozza case, the Supreme Court took the position that to sustain conviction, the testimony "must point directly to conduct within the narrow margins which the statute defines." These new provisions are designed to avoid the effect of that holding as to future violations." S. Rep. No. 2090, 85th Cong., 2d Sess. (1958); 3 U.S. Code Cong. & Adm. News 4395, 4580 (1958).

The difficulty the Government has in proving illicit distilling is in connecting a defendant with the particular offense with which he is charged. This difficulty results in part from the statute: each step in the process of illicit distilling is narrowly defined as a separate offense. As the Supreme Court pointed out in *Bozza:*

> The Internal Revenue statutes have broken down the various steps and phases of a continuous illicit distilling business and made each of them a separate offense. Thus, these statutes have clearly carved out the conduct of making mash as a separate offense, thereby distinguishing it from the other offenses involving other steps and phases of the distilling business. Consequently, testimony to prove this separate offense of making mash must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it." *Bozza* v. *United States,* 1947, 330 U.S. 160, 67 S. Ct. 645, 91 L. Ed. 818.

There is little doubt of Congress' power in civil cases to establish a rule of law of presumptive evidence that is essentially a regulation of the burden of proof. See Mr. Justice Holmes' opinion in *Casey* v. *United States,* 1928, 276 U.S. 413, 418, 48 S. Ct. 373, 72 L. Ed. 632 and Mr. Justice Cardozo's opinion in

Morrison v. *California*, 1934, 291 U.S. 82, 90, 54 S. Ct. 281, 78 L. Ed. 664. When, however, the legal effect of the rule is to allow an accused person to be found guilty of a crime solely on the basis of the presumption, unless he comes forward with evidence to overcome the nonexistence of the presumed fact, the practical effect is to coerce the accused into taking the stand in spite of the Fifth Amendment provision that "No person . . . shall be compelled in any criminal case to be a witness against himself." The presumption gives short shrift to the constitutional privilege. It is all very well to say that the defendant need not take the stand: all he has to do is to come forward with evidence.[2] But should the accused exercise his constitutional privilege of remaining silent, the presumption amounts to decisive, unanswerable comment on his Fifth Amendment right not to testify. Even if an accused should take the stand, the effect of the presumption does not disappear, since the law provides that the presumption is still "sufficient evidence to authorize conviction." A person accused of a crime has more than the right to present evidence in his defense. He has the constitutional right to sit on his hands. As Justice Peaslee of the New Hampshire Supreme Court ably said:

> It is said that so long as the defendant has preserved to him the right to fully present his defense, and then have the evidence weighed, he has nothing to complain of. But the right to make defense is not the whole right secured to one charged with crime. He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of his guilt, and that this evidence shall be weighed by the

[2] See 4 Wigmore on Evidence §1356, p. 732 (3d Ed. 1940).

> jury and found sufficient to prove the case. It is his right to produce any evidence and to stand solely upon the proposition that the state must prove a case against him.
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> * * * * *
>
> The rule of the Constitution is that the defendant in a criminal case cannot be compelled to go forward.
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> * * * * *
>
> In a criminal prosecution, nonaction of the defendant cannot be substituted for action upon the part of the state, as to any matter required to be established as a part of the state's case. Neither the burden of proof nor the burden of proceeding with any evidence to prove such case can be imposed upon the party charged with crime. *State v. Lapointe,* 1924, 81 N.H. 227, 123 Atl. 692, 696.

"[I]t is not within the province of a legislature," Justice Holmes has said, "to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Refining Co.,* 1916, 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 890. The unquestioned policy of the criminal law has placed upon the prosecution the burden of proving beyond a reasonable doubt all facts necessary to the defendant's guilt. The Government starts with both the burden of proof and the burden of persuasion.[3] A statute which shifts either one or both of these burdens to an accused is difficult to reconcile with our hard-earned heritage of fair trials. If the shift compels an accused to come forward with an exculpatory explanation—or else, be-

[3] Here we are not concerned with exceptions based on affirmative defenses such as insanity and self-defense. These defenses do not negative the factual elements of guilt which the prosecution must prove. See Note, Rebuttable Presumptions 55 Col. L. Rev. 527, 543 (1953).

fore the prosecution has made a substantial showing of probability of guilt, the presumption collides with the most fundamental canon of criminal law—the presumed innocence of the defendant. These considerations compel the courts to scrutinize closely any statutory rebuttal presumption of an ultimate fact essential to the proof of a crime.[4]

This brings us to the magic words, "rational connection," the touchstone by which the Supreme Court tests the validity of a statutory presumption. It is not an easy test to apply: in the nature of things any test would lack concreteness. Such a test is perhaps open to the criticism that rationality of legislation is off-limits to the judiciary. Still, it is the test we must apply. We read it as a test of *reasonableness* more

[4] There is a large volume of legal writings on rebuttable statutory presumptions. See, for example, Thayer, Preliminary Treatise on the Law of Evidence at the Common Law 313–52 (1898); 4 Wigmore, Evidence § 1356, 2490–93, (3d Ed. 1940); McCormick, Evidence 639–40 (1954); Bohlen, The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof, 68 U. of Pa. L. Rev. 307 (1920); Brosman, Statutory Presumptions, 5 Tul. L. Rev. 17, 178 (1930–1931); Keeton, Statutory Presumptions, 10 Tex. L. Rev. 34 (1932); Morgan, Some Observations Concerning Presumptions, 44 Harv. L. Rev. 926 (1931); Morgan, Instructing the Jury Upon Presumptions and Burdens of Proof, 47 Harv. L. Rev. 59 (1933); Hale, Necessity of Logical Inference to Support a Presumption, 17 S. Cal. L. Rev. 48 (1943); Morgan, Tot 1. United States: Constitutional Restrictions on Statutory Presumptions, 56 Harv. L. Rev. 1324 (1943); Ray, Presumptions and the Uniform Rules of Evidence, 33 Tex. L. Rev. 588 (1955); Note, Constitutionality of Rebuttable Statutory Presumptions, 55 Col. L. Rev. 527 (1955); Morgan, How to Approach Burdens of Proof and Presumptions, 3 Rocky Mt. L. Rev. 34 (1953); Morgan, 1 Basic Problems of Evidence 30, 33–55 (A.L.I. 1954); Laughlin, In Defense of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195 (1953).

than of bare *rationality:* to comply with the due process clause, proof of the fact upon which the statutory presumption is based must carry a reasonable inference of the ultimate fact presumed.

The Supreme Court first established this test in *Mobile, J. & K.C. R.R.* v. *Turnipseed,* 1910, 210 U.S. 35, 43 S. Ct., 136, 55 L. Ed. 78. *Turnipseed* was a civil action, but the test is applied in both civil and criminal cases. See also *Yee Hem* v. *United States,* 1925, 268 U.S. 178, 45 S. Ct. 470, 69 L. Ed. 904; *McFarland* v. *United States,* 1916, 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 890; *Minski* v. *United States,* 6 Cir., 1942, 131 F. 2d 614, affirmed 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519; *Caudillo* v. *United States,* 9 Cir. 1958, 253 F. 2d 513, cert. den. 357 U.S. 931; *Manning* v. *United States,* 5 Cir. 1960, 247 F. 2d 926; Annotations 51 A.L.R. 1139, 86 A.L.R. 179, 162 A.L.R. 477, 495. In *Tot* v. *United States,* 1943, 319 U.S. 463, 63 S. Ct. 1241, 1243, 87 L. Ed. 1519, the Supreme Court explained what it meant by "rational connection." The Court had before it the Federal Firearms Act, 15 U.S.C.A. § 902(f). Section 2(f) of this Act made it unlawful for a person who is a fugitive from justice or who has been convicted of a crime of violence to receive a firearm shipped or transported in interstate commerce. The Act provided that "the possession of a firearm or ammunition by any person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act." In holding that Section 2(f) violated the Due Process clause, the Court said:

> The Government seems to argue that there are two alternative tests of validity of a presumption created by statute. The first is that there be a rational connection between the facts

> proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, *if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.* This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is *so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.* [Emphasis added.]

Thus, under *Tot,* it is not enough that the fact proved be relevant to the ultimate fact presumed. The fact proved must carry an inference of the fact presumed. Moreover, the inference must not be "strained:" it must be so reasonably related to the fact proved as to tend to establish the defendant's guilt. For example, 18 U.S.C.A. § 659 makes it a criminal offense to have in one's possession goods knowing them to have been stolen from a carrier in interstate commerce. Under that statute evidence of a defendant's possession of recently stolen goods casts upon the defendant the burden of explaining the possession. There is a "rational connection" between an accused's possession of recently stolen property and the theft of the property. *Yielding* v. *United States,* 5 Cir. 1949, 173 F. 2d 46. And see *Wilson* v. *United States,* 1896, 162 U.S. 613, 16 S. Ct. 895, 40 L. Ed. 1090. "[I]n such a case it remains true that the

prosecution still has the burden of proving the accused guilty by evidence of facts and inferences fairly drawn from the fact proved." *Government of the Virgin Islands* v. *Torres,* D.C. Virgin Is. 1958, 161 F. Supp. 669. But suppose that all the statute requires the Government to prove is that the accused was in "possession" of an article "which may reasonably be suspected of being stolen." 14 V.I.C. § 2102 (b) so provided. In *Torres,* Judge Maris held that the statute was invalid under the Due Process clause; "There is not such a rational connection between the facts proved by the prosecution and the fact which the statute permits to be inferred from those facts."

How do subsections 5601(b) (1) and (2) fare under the "rational connection" criterion? First of all we note that the declared reason for the presumption, according to the Senate Finance Committee Report, is inconvenience of proof. Mere convenience to the Government in proving its case is not a sufficient basis for presumption. This is *Tot's* teaching. It is true that an accused knows why he possesses a firearm or is at a still-site, or has better means of information than the Government. In answer to this argument, the Court said in *Tot:*

> The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the infer-

> ence of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. 319 U.S. at 469.

Section 5601(b)(1) makes mere presence of a defendant at an unregistered distillery presumptive evidence that the still is "in his possession or custody, or under his control." A defendant's presence at a still is certainly a relevant fact, but it is not realistic or reasonable to say that such presence carries the inference of *possession* of the still. Possession of a thing such as a still involves the highly technical legal concept of dominion, control. As we pointed out in *McFarland* v. *United States,* 5 Cir. 1960, 273 F. 2d 417, 419, "Possession of a still is not the same as possession of a hat or a ring or a nickel." In that case we approved the definition the district court gave to the jury:

> Possession of an unlawful still means that the defendant must have some dominion over the property, or some extrinsic circumstance that gives him the right to possess which includes control. It means having, holding or detention of property in one's own power or command. Ownership, whether rightful or wrongful, is not necessary to establish possession. Possession may be defined as having personal charge of, or exercising the rights of management or control over the property in question. Mere presence at the scene of an unlawful distillery with nothing more doesn't constitute possession. 273 F. 2d at 419.

This Court has held, time and again, that "mere presence at a still site cannot support a conviction for violation of the liquor laws relative to the still." *Fowler* v. *United States,* 5 Cir. 1956, 234 F. 2d 697. Accord, *Vic* v. *United States,* 5 Cir. 1954, 216 F. 2d 228; *Cantrell* v. *United States,* 5 Cir. 1946, 158 F. 2d 517. See *McFarland* v. *United States,* 5 Cir. 1960, 273 F. 2d 417. The Fourth Circuit, in a case decided after the adoption of the 1958 Amendments to Section 5601, *United States* v. *Freeman,* 4 Cir. 1961, 286 F. 2d 262, held that:

> We have found no cases, and none have been sited, where mere presence in the general locality of the still, without some corroborating facts or circumstances to connect the accused with the particular still or the liquor business in general, has been held sufficient to convict one of carrying on the business of a distiller.

This absence of a natural inference of possession of a still from presence at a still distinguishes the presumption here at issue from the statutory presumption this Court upheld in *Manning* v. *United States,* 5 Cir. 1960, 274 F. 2d 926. There we were dealing with Section 4744(a)(1) of the Internal Revenue Code, which stipulates that "proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by Section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection. * * *" In such cases, unlike the case at bar, possession is proved. The statute simply creates a presumption that certain possessions are unlawful. On the other hand, in the instant case only presence near an unregistered still need be proved; the crime itself—possession—is presumed.

Violation of the narcotics laws from possession of marihuana is a natural and compelling inference, for there is almost no other explanation than guilt consistent with the possession of marihuana. The Ninth Circuit, passing on an almost identical statute in *Caudillo* v. *United States,* 9 Cir. 1958, 253 F. 2d 513, cert. den., 357 U.S. 931, 78 S. Ct. 1375, 2 L. Ed. 2d 1373, pointed this out clearly. "The difficulty with appellants' reliance on the Tot case is that it provides no precedent in this, a factually different case. The possession of a firearm or ammunition is ordinarily lawful. There exists the possibility of lawful possesssion of opium derivatives, or other narcotics, for they have definite therapeutic medical values and a scientific need exists for their possession by many doctors and almost every hospital in the United States. But this Court knows of no medical or scientific use to be made of marihuana, save perhaps for occasional testing, in order to make scientific comparisons with other narcotics, barbiturates, and amphetamines."

Marihuana is not a plant the ordinary citizen cultivates in his garden; almost no inference other than a violation of the narcotics laws can be drawn from possession of marihuana. But there are many inferences other than possession which can be drawn from presence at a still. A defendant might be a hunter who stumbled upon the still, as in *Vick* v. *United States,* 5 Cir. 1954, 216 F. 2d 228. He might even be a prospective purchaser of the liquor. He might be present for any one of dozens of other equally probable reasons having nothing to do with possession. Courts should defer to legislative judgment when the legislature, drawing on its broad knowledge of society and human relationships, decrees, for ex-

ample, that possession of marihuana, when proved, plus failure to produce an order form, "after reasonable notice and demand," form a proper basis for a rational inference of presumptive guilt. "But when the question is whether reasonable men may differ as to whether a given inference may reasonably be drawn from given data, the answer of a tribunal of last resort may rationally be accepted." Morgan, Note, 56 Har. L. Rev. 1324 (1943). And the courts hold, as a matter of law, that reasonable men can not infer possession from the given datum of an accused's presence at a still-site.

Since the presumption established by subsection 5601(b)(1) falls under the ban of unconstitutionality, subsection (b)(2) must, *a fortiori,* fall; for it makes presence at a still presumptive evidence of carrying on the business of a distiller. Certainly, there is far less ground for the probability of this inference—which, in fact, is a double one, from presence to possession to carrying on a business without bond—than there is for the first one. Neither statutory presumption is grounded upon "the normal balance of probability," *Tot* v. *United States,* 1943, 319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed 1519.

We hold, therefore, that the trial judge's incorporation of the presumptions into the instruction to the jury operated to deprive the defendants of their constitutional right to due process of law.

II.

None of the presumptions established by Section 5601(b) relate to Section 5602, which was the basis of the third count on which the defendants were convicted. In charging the jury, however, the trial judge referred to Counts two and three in almost identical

language and made little or no distinction between them. He stated, "Counts two and three charge that these three defendants carried on the business of distillers of spiritous liquors, Count two saying without having given bond as required by law, and Count three saying with intent to defraud the United States of the tax imposed thereon." In the only other reference to Count three he said, "under the law a substantive offense as distinguished from a conspiracy is a violation of any statute other than the conspiracy statute, for instance, possession of distilling apparatus as charged in Count one and carrying on the business of distillers as charged in Counts two and three." We hold that the trial judge erred in not specifically instructing the jury that the presumptions related solely to Counts one and two. In view of the close connection between Counts two and three, which were uniformly treated together by the trial judge, it is unlikely that the jury could have made a distinction between the presumptions and the specific counts to which they related.

III.

The record shows no evidence whatever of intent to defraud. The conviction under Count three cannot therefore be supported.

IV.

The only question remaining is whether the case should be remanded for a new trial because, aside from the presumptions, there is sufficient evidence to sustain a jury verdict of guilty.

The appellents point out that defendants were never actually working at the still, but were merely in or near the site when arrested. They rely on such cases

as *Vick* v. *United States*, 5 Cir. 1954, 216 F. 2d 228 and *Fowler* v. *United States*, 5 Cir. 1956, 234 F. 2d 697, which we have referred to earlier in this opinion.

We find far more than mere unexplained presence at a still. Defendants drove up to an illicit distillery hidden in a swamp at 4:40 in the morning. They were carrying no rifles, fishing gear, or any other equipment which a hunter or fisherman would have with him. Rather, they were hauling in a Dodge pick-up, not the two cans of gasoline which were in evidence in *Fowler*, but a full tank of butane gas, identical with eight others at the still-site. When they saw the officers, they tried to escape. Moreover, two of the arresting officers testified that Barrett had admitted ownership of the still, and the owner of the property on which the still was located testified that Cleveland Johns had offered to pay him $15.00 a week if he could use the land by the swamp to "do a little business." As we said in *McFarland* v. *United States*, 5 Cir. 1960, 273 F. 2d 417, 419:

> There is no doubt that mere presence at a still is not enough in itself to constitute possession of the still. There is no doubt that flight is not enough in itself to create a presumption of guilt. But presence at a still in the dead of night, flight, knowledge of the location of a well-concealed still, knowledge of the operations (when the mash would be ready for distillation), control over the still (no others were present except in a subordinate capacity), control (purchase?) of the output, admissions of previous visits to the still, and other evidence pointing to McFarland's relation to the still were enough for the jury to infer that he had control and custody to the extent sufficient to add up to possession.

We hold, therefore, that the record shows sufficient evidence on the first two counts to support a jury finding that the defendants were in possession of the unregistered distillery.

Jurors are practical persons. It is entirely possible that here the jurors assessed the presumptions for what they are worth or entirely ignored them. Because, however, it is impossible to know the extent, if any, to which the jury relied upon the presumptions in returning its verdict, and whether it believed all, part, or none of the evidence other than that establishing the defendants' presence at the still, we have concluded that in the interests of justice the case should be REVERSED and REMANDED for a new trial on Counts One and Two.

A true copy.

Test:

EDWARD W. WADSWORTH,
Clerk, U.S. Court of Appeals, Fifth Circuit.

By G. F. GANUCHEAU,
Deputy.

OCTOBER 25, 1963,
New Orleans, Louisiana.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19574

D.C. DOCKET NO. 1411 CRIM—AMERICUS DIV.

ROY LEE BARRETT, JACKIE HAMILTON GAINEY AND CLEVELAND JOHNS, APPELLANTS

versus

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and JOHNSON, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for a new trial on Counts One and Two.

SEPTEMBER 5, 1963.

Issued as Mandate: October 11, 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963